STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2004
v	No. 244940 Bay Circuit Court
EDWARD DUANE ARQUETTE, Defendant-Appellant.	LC No. 01-001511-FH

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of one count of second-degree criminal sexual conduct, second or subsequent offense, MCL 750.520c(1)(a) (child under thirteen years of age); MCL 750.520f. Defendant was sentenced to 156 to 270 months' imprisonment. We affirm defendant's conviction and sentence and remand the case to the trial court for entry of a sentencing guidelines departure form.

Defendant's conviction arises from his sexual molestation of his eleven-year old niece. Defendant argues that the trial court abused its discretion by admitting prior bad acts evidence of defendant's alleged sexual molestation of two other nieces and a fourteen year old girl who babysat his children. Defendant maintains that the other bad acts testimony was not admitted for a proper purpose, that the evidence was more prejudicial than probative and that the trial court failed to provide a proper limiting instruction.

A trial court's decision to admit other acts is reviewed for an abuse of discretion. *People v Sabin (On Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion exists when an unbiased person reviewing the same facts as that of the trial court would conclude that there was no justification for the court's ruling. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Even if properly preserved, error in the admission of bad acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378-379; 624 NW2d 227 (2001).

MRE 404(b), which governs admission of other acts, provides in pertinent part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible, the evidence (1) must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under the balancing test of MRE 403; and (4) the trial court may provide a limiting instruction if requested. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id*.

Here, the prosecution offered the other acts evidence for purposes listed as proper under MRE 404(b): to prove defendant's intent, scheme, plan or system. Defendant asserts that the evidence was inadmissible because there were no similarities between the prior bad acts and the instant acts as probative of defendant's plan, scheme or system. We disagree.

Defendant had an established relationship with all his victims. Three of the victims were his nieces and one was his children's babysitter. All were between the ages of eleven and fourteen. The assaults occurred at defendant's home. He generally showed the girls a pornographic video prior to the molestation. His method in wiping his semen off the victims after he ejaculated on them was also similar. Thus, while we agree with defendant that there were several dissimilarities between the acts, we conclude that the similarities and circumstances were substantial, pointing to a common scheme, plan, or system in doing an act. Further, the trial court gave the jury two limiting instructions. We find no abuse of discretion.

Defendant next argues that the evidence was inadmissible to show intent because defendant's intent was not an issue at trial. We agree that there was no need to admit the evidence to show defendant's intent. However, the error was harmless. As previously discussed, the evidence was properly admitted to show a common scheme, plan or system in doing an act.

Defendant also argues that the trial court abused its discretion in failing to consider the prejudicial impact of the evidence because the evidence was not similar to the charged acts. We disagree. The third prong of the *VlanderVliet* test requires a determination that the probative value of the evidence is not substantially outweighed by unfair prejudice under the balancing test of MRE 403. The MRE 403 balancing test requires that the unfair prejudice substantially outweigh the probative value of the evidence. As previously discussed, the other acts were substantially similar to the charged acts. Further, while the probative value of the other acts evidence was relatively high, the evidence also served to rebut claims of fabrication. On balance, we do not conclude that there was no excuse or justification for the court's ruling.

Defendant also argues that the trial court failed to provide the appropriate limiting jury instruction. However, defendant does not argue the merits of the argument and fails to explain why he believes the limiting instructions that the court gave the jury were improper. Contrary to

defendant's assertion on appeal, we conclude that the court gave the appropriate limiting instructions. In sum, we find that the court did not abuse its discretion in admitting testimony regarding defendant's alleged molestation of his two nieces and his children's babysitter.

Defendant next argues that the trial court abused its discretion in allowing into evidence two hearsay statements under MRE 803. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Pursuant to MRE 802, hearsay is inadmissible unless otherwise provided by the Michigan Rules of Evidence. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The first was the victim's statement to the treating physician in which she identified defendant as the person who molested her. Defendant asserts that the trial court improperly allowed the statement into evidence when the prosecutor failed to establish that the victim made the statement while seeking medical treatment or that the statement was necessary for medical treatment. MRE 803(4) allows the admission of out-of-court statements "made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history . . . insofar as reasonably necessary to such diagnosis and treatment."

We agree that the prosecutor failed to establish that the statement was made for medical diagnosis or treatment. The victim's mother testified that she initiated the medical examination for investigative purposes. However, an erroneous admission of hearsay evidence "can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). The evidence was harmless because it was corroborated by the testimony of the victim who was the actual the declarant of the statement.

The second out-of-court statement is the statement the victim made to her mother, again identifying defendant as the perpetrator. Defendant asserts that the statement was inadmissible hearsay because the prosecutor failed to establish that it was made while the victim was under the influence of the startling event. An out-of-court statement is admissible under the "excited utterance" exception to the hearsay rule if it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). For a statement to be admissible as an excited utterance (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Although the amount of time between the startling event and the excited utterance is "an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive." *Id*. at 551. This Court must also consider such physical factors as "shock, unconsciousness, or pain, [which] may prolong the period in which the risk of fabrication is reduced to an acceptable minimum." *Id*. at 551-552.

The evidence established that the victim told her sister and cousin about the incident a few hours after it occurred because she was upset that they were on their way to visit defendant. The victim's sister informed the victim's mother of the incident. The victim was very upset and was crying, and the victim's mother had to repeatedly ask the victim about what had happened before she was able to tell her. Whether a statement was made in response to questioning does not in and of itself preclude the statement from being an excited utterance. Rather, is a factor

militating against admitting it. *People v Petrella*, 124 Mich App 745, 759-760; 336 NW2d 761 (1983). We conclude that the statement was admissible under the excited utterance exception to the hearsay rule because the statement had the indicia of reliability despite the three-hour delay in which the victim reported the incident to her mother.

Defendant next argues that the trial court erred in its upward departure from the sentencing guidelines. The trial court's factual determinations are reviewed for clear error, and the court's departure from the minimum recommended sentence ranges is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A court's departure is not an abuse of discretion if objective and verifiable factors support the substantial and compelling reasons given by the court for the departure. *Id*. at 270.

Defendant's minimum sentence of 156 months was an upward departure from the guidelines' minimum sentence range of thirty-six to eighty-eight months. A trial court may impose a sentence representing a departure from the sentencing guidelines only if the court has a substantial and compelling reason for the departure and makes a record of its reason. MCL 769.34(3). A "substantial and compelling reason" "must be construed to mean an 'objective and verifiable' reason that 'keenly' or 'irresistibly' grabs our attention." *Babcock, supra* at 257-258. A trial court may not base its departure on a characteristic of the offense or of the offender already considered by a defendant's OV and PRV scores unless the court specifically finds from facts on the record that a disproportionate or inadequate weight was given to the characteristic. MCL 769.34(3)(b).

Defendant first challenges the trial court's determination that the existence of more than one of the specified factors in OV 10 could provide a basis for an upward departure from the sentencing guidelines. Under OV 10, ten points are scored if defendant was in an authority position over the victim, or in a domestic situation with the victim, or exploited the victim's youth. MCL 777.40(1)(b). Defendant contends that the statute contemplates the existence of more than one of the specified factors and, therefore, the existence of more than one of the factors is not a proper basis for a departure. Here, the court expressly stated on the record that the sentencing guidelines do not clarify whether the existence of more than one factor would have an effect on the scoring.[1] We find it unnecessary to determine whether the statute contemplated the existence of more than one factor. Our review of the sentencing transcript establishes that the trial court provided a detailed explanation into the reasons why it believed OV 10 failed to adequately reflect the circumstances for the conviction. We conclude that the court correctly found that the *combination* of the victim's young age, defendant's familial bond as her uncle, and his position of authority based on the bond were given inadequate weight in OV 10's scoring standards.

Defendant next challenges the trial court's determination that OV 13 failed to adequately reflect the seriousness of defendant's criminal conduct. OV 13 is scored when there is a

[1] Although not raised by the parties, we note that the trial court failed to complete a sentencing departure form. Accordingly, we rely on the sentencing transcript in determining the sentencing issues on appeal.

continuing pattern of criminal behavior. Twenty-five points are scored when an "offense was part of a felonious criminal activity involving 3 or more crimes against a person." Here, the trial court articulated factors involved in defendant's conduct that were not adequately addressed by any offense variable. The court was concerned over defendant's continuing pattern of criminal sexual behavior with young girls as demonstrated by the fact that defendant was on probation for third-degree criminal sexual conduct at the time he molested the victim, that charges of second-degree criminal sexual conduct against another victim were pending, and the manner in which defendant used a plan and pattern to molested his nieces and his children's babysitter as testified to at trial. Here, the continuing pattern was objective and verifiable, and the court's departure from the statutory guidelines was proportionate to the seriousness of defendant's conduct. Therefore, the court did not abuse its discretion.

Finally, defendant argues that the trial court improperly considered defendant's likelihood for rehabilitation. We disagree. The court expressly stated on the record that it was not considering defendant's potential for rehabilitation.

Defendant's conviction and sentence are affirmed. We remand the case to the trial court for its entry of a guideline departure form. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot